

Remarks/Arguments

In a Final Office Action dated January 21, 2009, claims 1, 19, 37 and 55 were rejected under § 102 over Cometto (U.S. Patent No. 7,206,288) and claims 2-7, 20-25, 38-43, and 56-61 were rejected under § 103 over Cometto in view of Soumiya (U.S. Patent No. 6,671,257). Applicant requests reconsideration in view of the remarks below.

Amendments

Claims 1, 19, 37 and 55 have been amended to incorporate the transmit and receive rates portion of claims 3, 21, 39 and 57, respectively. The claims have further been amended to clarify that the transmit and receive rates are measured rates.

Section 103 Rejections

Claims 3-7, 21-25, 39-43 and 57-61

Claims 3-7, 21-25, 37-43 and 57-61 were rejected under § 103 over Cometto in view of Soumiya. The element of claims 3, 21, 39 and 57, which are the basis of this argument, are now in claims 1, 19, 37 and 55, the independent claims in this case. Applicant traverses the rejection.

The Office Action cites Soumiya col. 26, lines 21-23; col. 35, lines 21-36 and col. 7, lines 27-28. Referring to col. 26, lines 21-23, a rate changing unit 105 and a rate calculating unit 104 are mentioned. Col. 25, lines 23-38 describe the rate calculating unit 104 in more detail, but basically the unit 104 simply does a calculation of dividing the transmission rate set for each output channel by the number of active virtual connections. Thus no actual data transfers are measured. Col. 25, line 39 to col. 26, line 20 describes the rate changing unit 105 in more detail, but basically the unit 105 simply detects congestion and changes the rates provided by the rate calculation unit 104 accordingly. The unit 105 also does not measure actual data transfers. Col. 36, lines 21-36 just relates to determining the number of active connections. It is stated as being done over a simple period. There are no actual data transfer rates measured, just the number of active connections is counted.

Applicant submits that the cited portions of Soumiya do not teach measured transmit and receive rates for inclusion in a frame transmit, even over a first period and clearly not over a first and a second period. The Final Office Action responds by stating that the feature relied on (measuring a data transfer rate) is not recited in the claims. Applicant requests reference to ¶ 0048 of the published application. Applicant provides the two sentences related to defining the term "transmit and receive rates" used in the claims.

Basic statistics preferably include the transmit and receive rates, in bytes or four byte words, for the input and output ports over a defined short period, and optionally, a long period, based on a setting in the switch and the relevant short and long time periods. The rate is preferably developed by dividing the number of bytes transmitted or received during the long or short period by the period. Additionally, in each

Applicant submits that these sentences make it clear that "transmit and receive rates" as used in the specification are developed by dividing a number of bytes transferred by a time period, thus being a measured rate. Applicant therefore submits that the term "transmit and receive rates" refer to actual measured rates as previously argued. While Applicant believes that this usage from the specification should be sufficient, the claims have been amended to include "measured" to avoid the issue and any potential argument. Applicant therefore submits that the rejection as to claims 3-7, 21-25, 39-43 and 56-61(now claims 1-7, 19-25, 37-43 and 55-61) is not properly supported and requests withdrawal.

Petition Under § 1.144

Applicant notes that a Petition contesting the restriction requirement is being filed contemporaneously with this response so that cancellation of the non-elected claims is not required. The non-elected claims have been marked as withdrawn.

Conclusion

Based on the above remarks Applicant respectfully submits that the rejection of the claims is improper and requests withdrawal. Reconsideration is respectfully requested.

Respectfully submitted,

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